No. 2852

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

vs.

SOUTHERN OREGON COMPANY, a corporation; COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County, and T. M. DIMMICK, Treasurer of Coos County, Oregon; and FLANAGAN & BENNETT BANK, a Corporation
DEFENDANTS IN ERROR

Brief on Behalf of Plaintiff in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

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Brief on Behalf of Plaintiff in Error

Upon Writ of Error
to the District Court of the United States for the District of Oregon.

This case comes here upon a Writ of Error to the District Court of the United States for the District of Oregon to review the decision of that Court sustaining a demurrer to Plaintiff's Amended Complaint, and, plaintiff declining to plead further, in entering judgment against plaintiff for costs.

For a clear understanding of the points involved, the following concrete statement of the allegations of the complaint may be considered as accurately outlining plaintiff's position.

I.

On the second day of July, 1912, the Southern Oregon Company brought suit in the Circuit Court of the State of Oregon for Coos County against W. W. Gage, Sheriff and Tax Collector of Coos County, to restrain said Sheriff from advertising the property of the said Southern Oregon Company for sale for delinquent taxes or from issuing tax delinquency certificates against plaintiff's property.

II.

The complaint in the suit of the Southern Oregon Company against Gage, while not pleaded in the complaint in this suit, was used in the argument by both sides and its terms admitted, and it may be considered now as before the Court. That said complaint contained an offer by the Southern Oregon Company to pay into Court an amount of money equal to the taxes upon the lands of the said Southern Oregon Company, the money to be delivered to defendant (Gage) upon a contingency, which was stated as follows:

> "The plaintiff is ready and willing and able to pay all moneys now appearing to be due as taxes upon said lands as shown by the tax rolls of said county either into the hands of the

Clerk of this Court or into the hands of a receiver to be appointed by this Court, and the plaintiff now brings said money into Court and offers to pay the same either into the hands of the Clerk of this Court or into the hands of a receiver to be appointed by this Court, upon an order of this Court, requiring said Clerk or receiver to hold said moneys in trust, to be delivered to defendant if it shall finally be decided by the United States Court where said cause is now pending, that said lands are subject to taxation, but to be repaid to this plaintiff in case it shall be decided by said Court that said aforesaid lands are the property of the United States of America."

That said bill of complaint prayed for an order temporarily restraining the said Gage from advertising the property of said Southern Oregon Company or from issuing delinquency tax certificates, and furthermore, prayed for an order appointing a receiver to receive the money to be so deposited by the Southern Oregon Company, and for an order requiring the defendant (Gage) to issue and deliver to said receiver tax receipts for all the taxes then due upon the lands.

III.

That immediately upon filing said complaint, and on the third day of July, 1912, the Court *ex parte* made the following order:

"This matter now coming on to be heard the Court having read the complaint herein and being fully advised in the premises and the Court being satisfied that this is the proper case for the issuance of a temporary order of injunction,

It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff, the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as tax collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of United States of America vs. the Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the complaint shall be held to be the property of the United States then said money so deposited with the Clerk shall be returned to the plaintiff, but if it be therein decided that said real estate does not belong to the United States, then said money shall be paid over by the Court to the defendant herein;

unless it shall meanwhile be otherwise ordered by this Court.

It is further ordered that the defendant, W. W. Gage, as sheriff and tax collector of said county do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a Judge thereof."

IV.

That a demurrer was filed by the defendant Gage to the complaint of the Southern Oregon Company in said case. It was claimed in the argument in the Court below by defendant's counsel and is admitted by plaintiff in error, that the decision on said demurrer was delayed until the third day of July, 1914, awaiting the opinion of the Supreme Court of the State of Oregon in the case of the Southern Oregon Company against Quine, 70 Oregon, page 63. This opinion was announced March 3rd, 1914, and rehearing denied April 7th, 1914.

V.

On the third day of July, 1914, the Court made and entered the following decree:

"Comes on now to be heard the demurrer of defendant to the complaint and demurrer of defendant to the supplemental complaint and the plaintiff appearing by A. S. Hammond, one

of its attorneys, and the defendant appearing by L. A. Liljeqvist, District Attorney, his attorney, and the Court having considered said demurrer and each of them, and being advised in the premises.

It is considered, ordered and adjudged that said demurrers be and each of them is sustained.

And the plaintiff stating in open Court that it would stand upon its Complaint and Supplemental Complaint and did not desire to amend or plead further.

It is considered, ordered, adjudged and decreed that plaintiff's suit be and the same is hereby dismissed and all restraining orders heretofore entered be and the same are hereby vacated and the temporary injunction issued herein is hereby set aside and said orders revoked, and it is further decreed that defendant have and recover his costs and disbursements issued herein and that execution issue therefor."

This decree was appealed from by the Southern Oregon Company and on the 13th day of April, 1915, the Supreme Court of the State of Oregon duly affirmed said decree. (Southern Oregon Co. vs. Gage, 76 Or. p. 427.)

VI.

Neither W. W. Gage, the Sheriff in office at the time the suit of the Southern Oregon Company against Gage was brought, nor the defendant A.

Johnson, Jr., who is the present Sheriff and Tax Collector of Coos County, Oregon, ever delivered to the said Clerk of Coos County, Oregon, any tax receipts or receipt on account of any taxes referred to in the complaint of the said suit of the Southern Oregon Company against Gage.

VII.

That all the money described in the complaint in this case belongs to the plaintiff, The Menasha Wooden Ware Company, and that plaintiff has duly demanded repayment of the same to plaintiff, which demand was made upon each of the two banks, upon the Treasurer and Clerk of Coos County, and payment has been refused.

VIII.

That the said suit of the Southern Oregon Company against W. W. Gage is ended and no further order can be made therein. That Sec. 3693 and 3694, Lord's Oregon Laws, provide for the issuance of certificates of delinquency for unpaid taxes and the manner of their foreclosure. That all the certificates of delinquency issued against the property of the Southern Oregon Company for the taxes involved in the said suit of the Southern Oregon Company against Gage are now being foreclosed in the manner provided by Secs. 3693-3694, L. O. L., and this without any reference to the said suit of the Southern Oregon Company against Gage.

IX.

Under the Oregon statute providing for the taxation of property and collection of taxes, the tax on real estate can be collected only from the real estate taxed. Under the law, prior to 1907, this was different. A warrant for the collection of delinquent taxes was deemed an execution against property and might be levied on the land taxed or any other property of the delinquent taxpayer. But this was changed by the Act of the Legislature of February 28, 1907, and delinquent taxes are now collected in accordance with the terms of Sections 3693 to and including 3705, Lord's Oregon Laws, and not otherwise.

THE DEFENDANT'S CONTENTION.

While numerous demurrers and motions have been filed by the different defendants directed against the complaint, they all revolve around two propositions:

(a) An action for money had and received will not lie upon the facts set out in plaintiff's complaint.

(b) Even conceding that plaintiff has rights in the premises and is entitled to demand the return of its money, yet the money held by the banks is in *custodia legis* and therefore the plaintiff cannot sue for its recovery but must apply to the Circuit Court of Coos County for an order of distribution.

We will endeavor to answer these propositions in the order of their presentation, and, first:

ACTION FOR MONEY HAD AND RECEIVED.

The action for Money Had and Received is a quasi-equitable action and the scope of the relief granted by the Court in cases where this action lies is not restricted by any technical rule. The Court recognizes the situation in each case and by its decree meets its requirements. We cite the Court to the following authorities in support of our complaint:

> "The question in an action for money had and received is, to which party does the money in equity, justice and law belong? All that plaintiff need show is that the defendant holds money which in equity and good conscience belongs to him (plaintiff)." 27 Cyc. 854.
>
> "The rule is well settled that an action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed." 27 Cyc. 855.
>
> "In an action for money had and received it is immaterial how the money may have come into the defendant's hands and the fact that it was received from a third person will not affect his liability, for in equity and good conscience he is not entitled to hold it against the true owner." 27 Cyc. 864.

In Hexter v. Poppleton, 9 Oregon, page 483, Lord, C. J., said:

> "This is an action for money had and received by the defendant to the plaintiff's use. It is said, in general, to lie for money which, *ex aequo et bono,* the defendant ought to refund as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained by imposition or extortion, or oppression, or taking an undue advantage of a party's situation, contrary to laws made for the protection of persons under these circumstances, and a sale made with such knowledge on the part of the party who causes it to take place, renders him liable in an action for money had and received." (Herman on Executions, Sec. 340, and authorities cited in the note.)
>
> "Lord Mansfield calls the action of assumpsit for money had and received, 'a liberal action founded upon large principles of equity,' and applicable wherever the debtor, having received money, cannot conscientiously retain it." (Moses v. McFarlone, 2 Burr. 1005.)

In Stewart v. Phy, 11 Oregon, pp. 335-336, the Court said:

> "Payment for Special Purpose—Action for Money Had and Received. An action for money had and received, lies to recover back money paid by a debtor to his creditor, to be applied in satisfaction of a particular obligation, when

the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay."

"It appears from the allegations that the respondent has money belonging to the appellant to the amount for which judgment is demanded, in his hands, which he clearly has no right to retain from the appellant, and we think the action lies."

Crane v. Runey, 26 Federal, pp. 15-16:

"Money Received on Erroneous Judgment.

"Where money is received on an erroneous judgment by a party thereto, the law, on a reversal of the same, raises an obligation against such party to restore the amount, which obligation may be enforced by an action as for money had and received to the use of the plaintiff therein."

"The law is well settled that on the reversal of a judgment an obligation arises on the part of the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party of or for what he has thereby lost. The reversal of the judgment gives a right of action as between the parties thereto, and creates an obligation against the one who has had the benefit of the same to restore to the other what he has thereby lost. At one time it was the practice to obtain this restitution, either by a writ of restitution when

the record showed what had been lost or what money had been paid, and in other cases by a *scire facias quare restitutionem non,* issued out of the Court where the judgment was given. But with the growth of the action for money had and received, these proceedings fell into disuse, and the obligation to restore has long since been enforced by action; and under the code there is no other remedy that I am aware of." Bank of U. S. v. Bank of Washington, 6 Pet. 17, 19; Clark v. Pinney, 6 Cow. 299. And see Yates v. Joyce, 11 Johns, 140; Hoster v. Poppleton, 9 Ore. 482; Rapalje & S. Law Dict., "Restitution," "Scire Facias."

Walsh v. National Broadway Bank, 32 N. Y. Supp. 734-736:

"Money Had and Received—When Lies.

"An action for money had and received lies against a bank with which money belonging to plaintiff had been deposited by a third person in his own name, and it is immaterial whether or not the bank had knowledge of the facts when it received the deposits."

"The rule must be regarded as well established by frequent decisions of the courts in this state that, so long as money or property belonging to the principal, or the proceeds thereof, may be traced and distinguished in the hands of the agent, or his representatives or assignees, the principal is entitled to recover

it, unless it has been transferred for value, without notice. In other words, when the debt created by a deposit belongs to the principal, instead of the agent who made it in his own name, the bank, upon notice of the facts, must recognize the actual, rather than the nominal, depositor. Van Alen v. Bank, 52 N. Y. 1; Baker v. Bank, 100 N. Y. 31 (2 N. E. 452); Viets v. Bank, 101 N. Y. 563 (5 N. E. 457); O'Connor v. Bank, 124 N. Y. 324, 332, 333 (26 N. E. 816); Holmes v. Gilman, 138 N. Y. 369 (34 N. E. 205). The case before us comes clearly within this principle. The plaintiff, by this action, seeks to recover only such a sum as remained on deposit with the defendant after notice had been given to it of the plaintiff's claim of title thereto. The case, therefore, is free from hardship to the defendant, which, at most, will be required to repay to the plaintiff only such sum as it would have been compelled to pay to her attorney at the present time if such notice had not been given; in other words, payment to the principal will absolve the defendant from making payment to the agent.

"It is immaterial whether the defendant knew of the trust when it received the deposit in question. Church, C. J., in speaking for the Court upon this subject in Van Alen v. Bank, *supra,* at page 10, says:

" 'It was suggested on the argument that notice to the bank by the depositor was neces-

sary, to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important.'"

And in Roberts v. Ely, *supra,* Andrews, J., who spoke for the Court, at page 132, 113 N. Y., and page 606, 20 N. E., said:

> "It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff."

In Walsh v. National Broadway Bank, 33 N. Y. Supp. 998-999, the Court said:

> "Money instrusted to an agent for specific investment, but by him diverted from its destination, and deposited in bank to his personal account, may, after demand, be recovered of the bank by the principal, in an action for money had and received, although at the time of the deposit the bank had no notice of plaintiff's right, and although at the time of the demand

the plaintiff did not present the depositor's check. 32 N. Y. Supp. 734, affirmed."

"The demurrer concedes that the money was plaintiff's, not Breck's, and that defendant holds it merely as a depository for Breck. But, being the money of plaintiff, and wrongfully deposited by Breck to his own account, by what right may the defendant retain it from the lawful owner? The answer is that by the deposit the money became the property of defendant, and it became a debtor to Breck for the money. Undoubtedly, this is the relation between Breck and the bank; but the plaintiff is not a depositor with the defendant, and the deposit of her money by Breck, as his, was utterly ineffectual to divest her title. O'Connor v. Bank, 124 N. Y. 324, 333, 26 N. E. 816. In the absence of estoppel, one may not be deprived of his property by the wrongful act of another. The defendant's position is as custodian of a fund to which, *ex aequo et bono,* the plaintiff is entitled; and, by virtue of elementary principles, she may reclaim it in a common-law action, even though the defendant received it without notice of her right. Roberts v. Ely, 113 N. Y. 128 (20 N. E. 606); Chapman v. Forbes, 123 N. Y. 532 (26 N. E. 3); Bank v. Peters, 123 N. Y. 272 (25 N. E. 319); O'Connor v. Bank, *supra,* Refining Co. v. Fancher, 145 N. Y. 552, 557, 40 N. E. 206."

Garland v. Salem Bank, 6 American Decisions 86:

"MONEY PAID UNDER MISTAKE—The indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given, paid the amount to a bank where it was left by the holder for collection, which amount was passed to the holder's credit by the bank. Within three days, the indorser, having discovered his mistake, and the money not yet having been paid over, reclaimed it from the bank. It was held the indorser could recover the money from the bank, although after the reclamation they had paid the amount to the holder."

In Van Alen v. American National Bank, 52 N. Y. 1-6-7, the Court said:

"Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other money belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor.

"In such case, in an action brought by the principal against the bank, upon its refusal to pay upon presentation of the agent's check for the amount so deposited, the bank cannot set

up a want of privity. It is a question of title solely."

"It is said that the secret intention of Van Alen & Rice cannot effect such a result. Between them and the defendants as to the substitution it was not a secret. They in substance notified the plaintiff that they had placed on deposit the proceeds of his bonds and would keep it for him. They did deposit the amount which they treated as the proceeds, and declared it to be such. Can they deny it? Can anyone for them? If I send a note to an attorney to collect, and deposit the money in a bank in his own name and keep it for me, is my title to the money impaired because he fails to deposit the identical bills? My agent collects $100 rent for me and puts the bills in one pocket and takes the same amount from another pocket and deposits it and notifies me. Are my rights gone by the change of money? I think not. Stripped of unsubstantial forms, the case presented is that of a person delivering stock or bonds to an agent for sale with directions to deposit the proceeds in a bank to the credit of the agent, but to keep it in that way for him, and the agent follows the directions. Can there be a doubt as to the ownership of the money as between the agent and principal? Clearly not."

In Beardslee v. Horton, 3 Michigan, 560-564, the Court said:

"An action for money had and received will lie where the defendant has in his possession money which in equity and good conscience belongs to the plaintiff, and it is not essential that there should be an express promise to pay, or any privity between the parties."

"The case of Cooper v. Wrench was an action of assumpsit for money had and received against the sheriff, who had collected the money in an execution in favor of the plaintiff's assignor. The court held the action maintainable."

"In the case of Allen v. Impett, the court say: 'This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy and applied to various purposes; with full notice of the bankruptcy, they refused to pay the money to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees.'"

"In the case of Eddy v. Smith, it was held that a purchaser of the equity of redemption could maintain an action for the surplus in the hands of the mortgagee who was the purchaser at the mortgage sale."

"It will be found upon examination, that it is not essential to the maintenance of this action, that there should be any express promise to pay, for the law implies a promise where justice imposes a duty."

In The Travellers' Insurance Company v. Health, 95 Penn. State, 333-339, the Court said:

"Restitution is not of mere right. It is frequently a matter of grace and resting in a sound discretion. Where, therefore, the Supreme Court, upon the reversal of a judgment on which the money was made, refused to grant a writ of restitution, said refusal is not a bar to the recovery of the money, where upon a second trial the verdict was for the defendant."

"The contention in the sixth assignment is that the refusal of this court to grant a writ of restitution immediately upon the reversal of the first judgment is a bar to this action. We do not think so. Restitution is not always of right; it is frequently a matter of grace, and the refusal to grant the writ before the second trial was had, and the right of the insurance company to recover the amount of premiums collected finally determined, cannot be a bar to the present suit instituted after the first was ended. In Harger v. Commissioners of Washington Co., 2 Jones, 251, it is said: 'Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.' In refusing the order of restitution the court may have been influenced by the fact, apparent on the record, that the plaintiff in error was guilty of laches in not prosecuting his first writ of error and permit-

ting the same to be *non prossed*, whereby he lost the benefit of his writ as a supersedeas; but, on whatever ground it may have been refused, we are of opinion that the refusal at the time and under the circumstances is not a bar to the present action."

Critzer v. McConnell, 15 Illinois, 172:

"Trust Funds — Misapplication — Form of Action.—If A. pays money to B. to be applied to a particular purpose, and B. delivers the same money to C. to be applied by C. to the same purpose, if C. misapplies the money, A. may recover the money back from C. in an action for money had and received."

Lawyers' Reports, Annotated, Book 4, p. 368 (syllabus):

"AN ACTION OF ASSUMPSIT MAY BE MAINTAINED by the owner of stolen money, to recover the amount thereof against one with whom it was deposited by the thief, and who, after notice of the owner's rights, paid it upon the thief's order to third persons."

Etna Insurance Co. v. Mayor, etc., 47 N. E. 593:

"When an assessment of taxes is valid on its face, but is void in fact from lack of jurisdiction in the assessors, an action may be maintained to recover money involuntarily paid in satisfac-

tion thereof, without first demanding its return, or having the assessment set aside."

Clark v. Pinney, 6 Cowen's N. Y. 299:

"Curia per Savage, Ch. J. The important question in this case is, whether *indebitatus assumpsit* for money had and received, lies to recover money paid on an execution upon a judgment, which was afterwards reversed.

"The general proposition is, that this action lies in all cases where the defendant has in his hands money, which, *ex equo et bono,* belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected. Of course, he is entitled to have it returned to him. The only question is, whether this be the proper remedy."

Cole v. Bates, 72 N. E. 333:

"An action for money had and received will lie where defendant has received money to which the plaintiff has an equitable right; plaintiff being able to trace the money in quity into defendant's hands, regardless of whether the money was deceived by defendant in the first instance."

It is apparent from these authorities that this action is properly brought for Money Had and Received for Plaintiff's Use and Benefit.

In such an action it is immaterial who deposited the money. The Court will not inquire who deposited it, how it was deposited, or when.

27 Cyc. 849.
Peterson v. Joss, 12 Ore. 81.

When the defendant has money in his possession which in equity and good conscience he cannot retain, it is unnecessary to allege a contract to pay over. The law implies the contract creates the liability and provides the means for its enforcement.

BUT A SINGLE CAUSE OF ACTION.

Something was said in the argument about two causes of action in the complaint. There is but one cause of action in each complaint.

SINGLE CAUSE OF ACTION.

When a single and continuous purpose runs through an etire transaction, made up of various acts, each of which might alone constitute a cause of action, it is proper to set up all the facts in one count as a single cause of action. 31 Cyc. 119.

In Boyce v. Odell Commission Co., 107 Fed. 58, an action to recover money lost in gambling on options—an action for money had and received—when the sums claimed were paid by the plaintiff to

the defendant at various times covering a period of several months, it was held that all of the transactions were properly set up in a single cause of action, the court saying:

> "It is oftentimes a nice and difficult question to determine when a given state of facts may be pleaded in a single paragraph as a single cause of action, and when those facts must be set up in separate paragraph.
>
> "In the present case the court is of the opinion that the facts stated in the complaint constitute one continuous transaction which is properly pleaded in the single count. The bets or wagers were all in pursuance of the common purpose, to carry on a scheme of gambling in margins. * * * One single and continuous purpose evidently ran through the entire transaction."

The court cited a number of cases from various jurisdictions to sustain this ruling.

The rule is well settled that an action for Money Had and Received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed. 27 Cyc. 855.

In an action for Money Had and Received, it is immaterial how the money may have come into the defendant's hands, and the fact it was received from a third person will not effect his liability if, in equity and good conscience, he is not entitled to hold it against the true owner.

CUSTODIA LEGIS.

Passing now to the second point in defendants' demurrer, we will discuss the doctrine of *custodia legis*. There is no dispute between counsel for defendants and ourselves as to this doctrine, which has become so firmly grafted upon judicial procedure everywhere that it may be regarded as fixed and unchangeable. It is as to the definition of the principle upon which it rests that we differ, and the sweep of its application in the present case.

Counsel for the defendants seem to be of the opinion that when money has once come into the hands of the clerk of a court in any proceeding in that court, it must remain for all time so deposited until *that* court orders its return or distribution—and this without reference to whether or not the purpose for which it was deposited has been accomplished, and without considering at all whether the proceeding which called for its deposit has been dismissed or abandoned. This is not the law—here, or anywhere.

To the end that the Court may exercise its powers unfettered and an orderly administration of justice be had without collateral interference, it is essential that the Court's possession of things it has taken hold upon be protected so long as that possession is necessary in the proceeding in which possession was taken. When the proceeding, whatever it may be—law or equity, bankruptcy, probate or admiralty—is ended, *custodia legis* is ended at the same time, and although there may be actual

physical possession of the thing itself still remaining in the officer, the intangible, impalpable—*nolo me tangere*—of the law is lifted and the property becomes subject to attachment, replevin or assumpsit as if it had never been in *custodia legis*. And so are the authorities.

It must be remembered in any discussion of this case that the order of July 12, 1912, was an *ex parte* order made without undertaking to pass upon the *merits* of the application. It did not order the Southern Oregon Company to do anything. It *did* order the defendant W. W. Gage to do something:

> "It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the land assessed to the plaintiff as owner, the defendant, W. W. Gage, as tax collector for said county, *shall also deliver to the Clerk of this Court proper tax receipts for such taxes*"—

is the language of the order. The defendant never did deposit the tax receipts, nor any of them. The order was made conditional upon his doing so. There was then merely an offer by the Southern Oregon Company to deposit the money in court if the defendant would deposit the tax receipts. This offer could be withdrawn at any time until acceptance, and it was never accepted. The defendant had the right to accept plaintiff's offer and deposit

the tax receipts, and if he had done so, the matter would have rested there, but he chose the other course. He denied the plaintiff's right to even make the offer—that is, he demurred to the complaint on the ground that it stated no legal reason why plaintiff should be permitted to remain in Court. Upon a hearing, his contention was sustained, plaintiff's case was dismissed, and judgment for costs entered against plaintiff. This judgment was affirmed by the Supreme Court. There is no longer any case in the Circuit Court of the State of Oregon for Coos County. There is no order to be made, or that can possibly be made concerning this money, except to give it back to the plaintiff. In 13 Cyc., p. 136, it is said:

> "A deposit in Court cannot ordinarily be taken out of Court by the depositor, *but if it was made on a condition with which the other party refuses to comply, the depositor may withdraw the fund as a matter of right.*"

In support of the foregoing proposition, the case of

Cummins vs. Rapley, 17 Ark., p. 381,

is cited, and it will be seen by an examination of the case that it fully bears out the principle stated. One Cummins filed a Petition in Chancery, alleging that Charles and Abraham Rapley had filed a bill against himself and others, alleging that he, Cummins, had recovered a judgment against the Rapleys on the law side of the Court for a certain sum

of money upon a note. That one-third (1/3) of said debt was due and payable according to the tenor of a certain contract and deed of trust made by the Rapleys theretofore to secure the said debt, among others. That by the bill which the Rapleys filed they offered to pay the debt according to the terms of the said deed of trust, and that they asked for an injunction against the collection of the judgment, and that the petitioner in the present suit be compelled to receive the money so offered to be paid according to the terms of the deed. That when the installment of one-third (1/3) of the amount of the judgment became due, according to the terms of the deed, the Rapleys deposited the one-third (1/3) with Peay, the Clerk of the Court. That upon the hearing of the Rapleys bill, Cummins refused to accept the money under the deed, but offered to take the same as absolute payment upon the debt. That the injunction against the collection of the judgment was dissolved and the bill dismissed, and on appeal to the Supreme Court the judgment was affirmed. That after the appeal was taken, Peay, the Clerk, permitted one of the Rapleys to withdraw the money without leave of Court. Cummins claimed that the Court should have ordered the money paid on the judgment, and prayed for a rule upon the Clerk and Charles Rapley to show cause why the money should not be restored.

The response of Peay and Rapley admitted the allegations of the bill. The Court said:

"The authorities cited by appellant do not sustain his right to have the money brought again into Court and paid over upon the judgment. No doubt where a defendant brings into Court and deposits so much money as he admits to be due the plaintiff on a demand sued for, it is a payment *pro tanto,* and he has no right to withdraw it. * * * *

"But here the complainants in the chancery suit deposited with the Clerk in vacation a sum of money for a specific purpose, subject to be accepted and withdrawn by Cummins on the terms and conditions upon which it was deposited. He declined so to accept it. On the hearing the bill was dismissed, and thereby the object for which the deposit was made by complainants was defeated.

"Cummins refused to accept the money on the terms proposed, and the Court denied the relief sought. We think the Rapleys had a right to withdraw the money."

The Supreme Court therefore affirmed the judgment of the Court below, denying the prayer of Cummins' petition that the money be restored to the Clerk.

In Harrington vs. La Rocque, 13 Ore., pp. 344, 347, the Supreme Court, by Lord, Chief Justice, said:

"It may be considered clear that when the distributor's share of an heir has been ascer-

tained and ordered paid by the Court, it is no longer regarded as in the custody of the law. The right to it has become fixed and the Executor ceases to hold it in his representative, but in his personal capacity. After distribution has been decreed, it may therefore be garnished in the hands of the Executor. And if the heir has assigned his interest or distributive share, the assignee may notify the Executor of his assignment for the purpose of requiring payment to him."

In Fleischner vs. Bank of McMinnville, 26 Ore., pp. 553, 561, the Supreme Court was confronted by the claim that money in the hands of an assignee for the benefit of creditors was in *custodia legis,* and the ownership could not be inquired into, but the Court said:

"A sufficient answer to the first objection is that this suit proceeds upon the theory that the assignment is fraudulent and void and therefore has no force or effect whatever. In such case the attempted assignment could not operate to place the property of the assignor in *custodia legis,* even if a valid assignment were to have that effect, and we are not advised of any rule of law which prevents a court of equity of competent jurisdiction from assuming jurisdiction upon a proper complaint to try and determine the validity of an alleged fraudulent assignment under the statute."

The lawful custody of specific property by a court of competent jurisdiction withdraws that property only *so far as necessary to accomplish the purpose of that custody, and until that purpose is accomplished* from the jurisdiction of every other Court:

Lang vs. Railroad, 160 Fed. 355;
Mound City vs. Castleman, 187 Fed. 921-924.

In Moran vs. Sturges, 154 U. S. 256, Fuller, Chief Justice, quoted from Buck vs. Colbath, 3 Wall. 334, 341, 345, as follows:

> "A departure from this rule (i. e., that a court of concurrent jurisdiction will not interfere with property in custody of another court) would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source. * * * *
>
> This principle, however, has its limitations. Or, rather its just definition is to be attended to. It is only while the property is in possession of the Court, either actually or constructively, that the Court is bound, or professes to protect the possession from the process of other courts. *Whenever the litigation is ended, or the possession of the officer or Court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.*"

In Dunn v. Hunt, (Minn.) 78 N. W. 1110, there was presented to the Court the question of the right to withdraw money deposited in Court to redeem from a mortgage foreclosure sale. Plaintiff had by order of Court paid into Court the money which he had tendered, amounting to $1,262. Before the case was decided, however, he obtained an order withdrawing the money. The decision of the case was against the defendant and he immediately moved to have the order permitting plaintiff to withdraw his tender rescinded and for a further order to impound sufficient of the money so deposited to satisfy his judgment. The Court denied the defendant this relief and answering the contention made there, as here, that the money being deposited in Court could not be withdrawn because in *custodia legis,* said:

> "But defendant never had any claim to or lien upon this money merely because it was paid into Court, because he always maintained a position hostile to and wholly inconsistent with any such claim and the judgment of the Court vindicates his position."

Merwin v. Fowler, (Wash.) 56 Pac. 374.
McAlmond v. Bevington, (Wash.) 63 Pac. 251.

Leroux vs. Baldus, 13 S. W. (Texas) 1019:

In an action brought against Connolly & Co. by the Galveston, etc., R. R. Co. the latter deposited with the Clerk of the District Court the sum of $7,226.21 to await the result of the suit. The plain-

tiff in that case recovered judgment for $5,004.06 which the Clerk paid, leaving in his hands $1,931.89. The plaintiffs in the above case, Leroux & Cosgrove, then sued Connolly & Co. to recover $445.86 and garnisheed Baldus, the Clerk. They recovered judgment against Connolly and the Clerk who refused to pay over the money, and the present action was then brought against Baldus to compel the payment by him of the amount of the plaintiff's judgment, but the Clerk defended on the ground that the surplus remaining in his hands was in *custodia legis* and therefore not subject to garnishment. The Court said:

> "The general rule that money or property in custody of the law is not subject to garnishment is well settled, and not questioned in this case. The reason upon which the doctrine is based is that 'no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind.' Brooks v. Cook, 8 Mass. 246, cited in Pace v. Smith, 57 Tex. 558. But this reason does not apply to the surplus or residue remaining with the officer after he has satisfied the writ, as he no longer holds it by virtue of any legal process, and it can therefore be reached by the defendant's creditors. Money paid to the Clerk of a Court in a partition suit was held to be liable to attachment after the Court had ordered it to be paid to the parties entitled thereto. Freem. Ex'ns, 130; Drake

Attachm. 509. Such is the weight of authority on this subject. In the present case the judgment in the case of the Galveston, Houston & San Antonio Railway Company against Connolly & Co. was the authority for the payment of the amount of the judgment ($5,004.06) to the former, and no further order to the Clerk was necessary. *The ascertained surplus, $1,-931.89, then left in the Clerk's hands, could no longer be regarded as in the custody of the law."*

Wilbur v. Flannery, 15 Atl. 203, 60 Vt. 581:

"Powers, J. In the execution of a decree of the court of chancery the defendant was ordered to deposit his deed of certain real estate in Underhill with the Clerk of that Court, upon a deposit with the Clerk for the defendant of a certain sum of money. The money and deed were both deposited with the Clerk in accordance with the decree. The deed was accepted, and taken by the party entitled, and the money was ready to be paid to the defendant when it was attached by the plaintiff. Both parties agree that money in *custodia legis* cannot be attached by the trustee process; and the inquiry is whether the legal grip upon this money had been dissolved. Our statute is broad, and subjects the goods, effects and credits of a debtor in the hands of a third person to the trustee process. The attaching creditor in such

process stands upon the right which his debtor has as against the trustee. In this case, Mr. Ray held money in his hands belonging to the defendant. As Clerk of the Court he had no further claim upon it. The purpose for which the law gave him its custody had been fully accomplished, and the only duty remaining was to pay it over to the defendant upon his call. If Mr. Ray had refused to pay it to the defendant on demand, the defendant clearly would have an action for the money. This being so, the plaintiff, as a creditor of the defendant, may reach the fund by this process. The only answer made by the defendant is that, on grounds of public policy, public officials should not be subjected to the trustee process, and this proposition is abundantly fortified by the exhaustive citation of authorities in the defendant's brief. But this case is outside the range of that proposition. Mr. Ray was a mere bailee of the money, not for the Court, nor for the parties to the litigation. As respects the deed and the money, which was to be exchanged, each for the other, he was the stakeholder appointed to effect the exchange. Any third person might as well have been appointed as the clerk. A sheriff who has collected money upon an execution is liable to the trustee process. He receives such money under color of his office, and holds it as a public officer. But his process has no further vitality when the money is collected, and he

has no remaining duty but to pay over the money. In this case, if Mr. Ray had held the money to be paid over when the Court should so order, he would be exempt from liability. But the order from the Court to pay it over antedated its receipt by him, and he was directed to pay when the deed was delivered. We can see no reason, under the language of our statute, why a clerk, under the circumstances detailed in the commissioner's report, should not be liable to the trustee process. The argument that he may be personally inconvenienced by being called away from his business applies to every other person exposed to this process. The judgment is reversed, and judgment is rendered on the report that the trustee is chargeable in the amount of the plaintiff's judgment against the principal debtor, and that the trustee recover his costs."

Dunlop vs. Patterson Fire Insurance Co., 74 N. Y. 145:

This was an appeal by James Jackson, the receiver of the property of the defendants in this action, from the order of the Supreme Court denying a motion by the receiver to set aside levies made under two attachments against the defendants or to allow the receiver to come in in the action in which the attachments were issued, for the purpose of moving to vacate the attachments, or the levies made thereunder.

The attachments were levied upon the sum of $2,000, then in the hands of the Clerk of the City Court of Brooklyn, in lieu of an undertaking on appeal from a judgment in the action in favor of one Redfield against defendant. The appellant was appointed receiver after the levy of the attachment under and by stipulation, also made after the levy of the attachment. An order was entered in the Redfield suit settling defendant's liability, directing the Clerk to pay to the claimant therein, out of the $2,000 on deposit, the sum of $650, and to pay the balance thereof to defendant's attorney.

It was urged on appeal that the property which was attached in this case was in the custody of a court of record; that it was therefore incapable of being seized or levied upon by attachments and that the case was as if an attachment had been granted without the power so to do in the Court or judicial officer allowing it. The Court said:

> "Doubtless the property, which was, in fact, made the subject of attachment, was in the custody of an officer of a court of record, and the appellant would at the time have had no right to remove it therefrom, or to meddle with it. But doubtless also, the appellant had a right and interest in that property, which was capable of being transferred by it, by its own act of assignment. Had it made an assignment of it, that act would not have removed it from the custody of the officer holding it, nor

would it have put upon him any greater liability than he assumed by the primary reception of it. He was liable to hold it, to answer the event of the litigation of Redfield with the appellant, and to return to the latter all that was not required to answer the proper demand of the former. And after the litigation should have been over with Redfield, would not the Clerk have been liable to the defendant for the whole of a residuum of the moneys, which liability could be enforced? And it was this last liability which would be the subject of the assignment. The claimant and real appellant, in this case, is a receiver appointed by a court in equity. He gets whatever title he has to this property, by operation of law, or by an assignment in fact, compelled by a court. Now could not that same liability be the subject of a transfer by process of law, as well as by the act of the corporation or by operation of law, and there be no illegal interference with the official power and duty of the officer holding the property? We think that it could. It may be granted that no process should have been issued which commanded the taking actual possession of the property, either exclusive of the Clerk of the City Court, or in common with him; nor, however the process was worded, should it have been executed by taking or attempting to take such possession. To such extent are some of the cases cited for the appellant. But there

was power to grant an attachment against the property of the appellant. The money in the hands of the Clerk of the City Court, or a residuary interest in it, was such property. The fund itself could not be taken away from him. It was the right to have from him, after the litigation with Redfield was ended, the whole or a residue of that money, which was such property. That right was not in the custody of that clerk, so that he could ever retain it, or, of right, pass it to another. An attachment against the appellant's property, levied upon that, took nothing out of the custody of the clerk, nor meddled with anything in his hands. It seized upon an intangible right, by means of the order of the Supreme Court and notice to the clerk of the issuance thereof. Such process and such action upon it made no conflict of jurisdiction between the two courts. The City Court held the money, with a conceded right. The officer of the Supreme Court held the right to receive it, or some of it, from the clerk, when the City Court should see fit to declare the purpose fully served for which it took it into custody."

Trotter vs. Lehigh Zinc and Iron Co., 42 N. J. Equity 456:

In certain litigation then pending involving a contract to mine and furnish ores to one of the parties being a non-resident, the whole consideration

paid out for the ores was ordered to be paid into Court as it became due so that in case the defendants, who established the right in the lower Court to set off any claim which they might have for damages, they could have this particular fund to satisfy such set-off in case there should be any decree of a pecuniary nature in favor of the complainant. The Court decided that the defendant had not the right to make such set-off; but as it was a matter of great importance to both parties, an order was made directing the retention of the moneys in the lower Court until the questions involved should be determined on appeal, in case an appeal should be taken to the Court of last resort. There was an appeal, and the Appellate Court also held that the defendants were not entitled to such set-off.

Then one Hockscher procured an attachment to be issued out of the Supreme Court of New Jersey against Trotter (the party who was entitled to the moneys which had been deposited,) which attachment was levied upon the moneys so deposited with the Clerk in the Court. The Court said:

> "Trotter resists, and insists that these moneys cannot be attached, nor any right or interest of his therein. This is placed upon the ground that the money is in the custody of the law, awaiting the execution of the law. The law upon this subject is well settled in New Jersey. *There is no judgment to be enforced in*

this case. The money was paid into Court or to the Clerk as the money of Trotter; and it has been retained there ever since as his money. This being so, I think there is no doubt but that the rights and interests of Trotter therein are subject to attachment."

Weaver, Adm'r. vs. Davis, 47 Illinois Reports, pp. 235-7:

In this case the Sheriff received upon execution a certain sum of money, being more than the amount due on the judgment. An attaching creditor levied his attachment on this sum in the hands of the Sheriff and it was claimed that the money was *custodia legis.* But the Supreme Court of Illinois rejected the claim and said:

"Court—What the Court intended by this, was, manifestly that when, as an officer, he had done all that was required of him, and had paid into Court or to the plaintiff, the money collected by the writ, and that had become *functus officio,* and there was a surplus remaining in his hands which, though coming to him as an officer, he did not hold in that capacity, but as trustee for the debtor, he might be liable, as such trustee, for the surplus, in an action for money had and received, as in the case of Pierce v. Carlton, *supra.* As to the surplus, the Sheriff was but a trustee; the money was not in the custody of the law, and for it an action for money had and received could be maintained."

When property is taken lawfully by virtue of legal process it is in the custody of the law, not otherwise. (8th A. & E. Ency'l. of Law, 532.)

Gilman vs. Williams, 7 Wis. 329-334; 76 Amer. Dec. 219:

In this case the Deputy U. S. Marshal seized two horses, alleged to be the property of the plaintiff in the action and claimed by plaintiff to be exempt from execution. Plaintiff brought replevin against the Deputy U. S. Marshal. He answered that he took the horses by virtue of an execution, issued out of the District Court of the U. S., for the District of Wisconsin, and the property was, therefore, in *custodia legis* and not subject to an action of replevin in the said Court. The Supreme Court of Wisconsin rejected this claim and in a decision, which has become a leading case, held: *That it was competent for a party by replevin or otherwise to reach property although in the hands of a Marshal, Sheriff or other Court officer, and that he could recover unless the Court or Court officer established the fact that he had a legal right to retain the property for some purpose to be thereafter determined by the Court in the proceeding in which the property was taken.*

Curiously enough, this case was cited by counsel for defendant in error in the Court below as sustaining *his* contention, and we insert it here for that reason. It goes further in *our* favor than we would care to go ourselves *on the facts in that case.* But

the general principle announced in the last four lines *supra* is correct. In order to sustain his possession as being *custodia legis,* the officer must show that he has "a legal right to retain the property for some purpose to be thereafter determined by the Court whose officer he was, named in the writ."

As in every case presented to a Court, authorities might be multiplied by the hundred applying fundamental principles in the decision of cases similar in their general outline, but differing vitally in the particular facts which differentiate them. Quoted *en masse* they have a tendency to confuse more than to enlighten. We have endeavored in the foregoing citations to present only those cases which, in our judgment, meet squarely the objections urged in the demurrer. We submit that the demurrer should be overruled. The complaint is properly brought for Money Had and Received. The money is not in *custodia legis,* and there is no possible order that the Court in Coos County could make with reference to it now. The object to accomplish which it was deposited was not accomplished—can never be accomplished. The state is proceeding as it has a right to do to collect its taxes by the foreclosure of delinquency certificates against the property of the Southern Oregon Company. It has not been injured by the litigation, the certificates of delinquency bearing interest at the rate of fifteen (15) per cent, and the property must pay it. There is no lien upon this money in favor of anyone. No one claims it or can claim it except

the plaintiff. Confessedly it belongs to the plaintiff, and the refusal of defendants to pay it over on demand is unexplainable and—unconscionable.

SECTION 24—JUDICIAL CODE.

In this action counsel for Flanagan & Bennett Bank have filed a supplemental demurrer, alleging an entirely new cause of demurrer—that is, that by the terms of Section 24 of the Judicial Code this Court has no jurisdiction. The portion of the section relied upon reads as follows:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer (and be not made by any corporation), unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

It is not necessary to determine whether this clause would control the Court's decision as to the $24,752.62, or the $3,863.26 referred to in Paragraph X of plaintiff's complaint. Perhaps it might. But clearly it has no reference whatever to the $35,000 advanced and furnished to the Southern Oregon Company by plaintiff, which sum is also a part of the amount sued on in said Paragraph X. Neither does it apply in any way to the other suit against the First National Bank of Coos Bay. This $35,000

always belonged to plaintiff and the title never went out of plaintiff. And the $93,309.07 sued on in the suit against the First National Bank of Coos Bay was always plaintiff's money and never became the property of the Southern Oregon Company, or any of the defendants.

The demurrer being general must be overruled if any part of the complaint states a cause of action. Waggy v. Scott, 29 Ore. 388. In this case the Court said:

> "The first ground of the demurrer admitted the truth of the probative facts alleged, and if the whole or any part of the complaint can be resolved into a cause of action, the general demurrer is unavailing to challenge its sufficiency. Ketchum v. State, 2 Ore. 103; Toby v. Ferguson, 3 Ore. 27; Simpson v. Prather, 5 Ore. 86; Jackson v. Jackson, 17 Ore. 110 (19 Pac. 847); Bliss on Code Pleading, Sec. 417. And the statement in the second count being clearly sufficient to constitute a cause of action, the court very properly overruled the general demurrer."

In construing the statute above quoted the Court will consider the purpose of the statute and the object to be accomplished.

In Barclay v. Levee Commissioners, 1 Woods 254, it is said:

"This provision was intended to prevent fraudulent assignments of choses in action made for the mere purpose of giving the Court jurisdiction and was not founded upon any constitutional principle."

In 1st Bissell, 98, it is said that this provision was incorporated into Section 24 "for the purpose of relieving Federal Courts as much as possible of enforcing local contracts and also of preventing assignments of choses in action to non-residents for the purpose of rendering defense upon the merits or a set-off less available to defendants."

In Goldsmith v. Holmes et al., 36 Fed. 484-7, tried in this Court, this statute was invoked in aid of a demurrer to the complaint as it is now invoked here, and Judge Deady said:

"The facts showing the true relations between the parties to this note, may, as between themselves, be alleged and proven by parol, for any purpose affecting either of their rights or liabilities thereon. The right of the plaintiffs 'to recover the contents' of this note from the defendants by an action in this Court, and the liability of the defendants therein, are among these rights and liabilities. Therefore when it is necessary, to maintain the jurisdiction of the Court in such an action, to show that the plaintiff, who upon the face of the note is in form an indorsee or assignee thereof, is in fact the payee of the same, it may be done."

This case was affirmed in 147 U. S. 150. We quote this to show how the statute has been interpreted. The Court will not be governed by mere matter of form but will determine what are and were the "true relations" of the parties and the transactions will take character from these relations and not otherwise.

The amount in controversy here is sufficient to give the Court jurisdiction—the necessary diversity of citizenship exists—the relief sought is such as this Court can give:—the Court will not decline jurisdiction unless forced to do so in carrying out the spirit as well as the letter of the law.

This is an action for money had and received—a fact which counsel seem to be determined to forget. This money belonged to the plaintiff at all times—title never passed out of it, and upon the face of the complaint the plaintiff is entitled to demand it from anyone having it.

The narrative part of the complaint was not necessary at all, but the complaint was so drafted in order to forestall a motion for a bill of particulars. If we had declared on the common counts we would have been compelled to furnish a bill of particulars if one were demanded, and, in any event, we would have to tell this whole story on the witness stand—and it might therefore be as well told in the complaint.

It is alleged, that on the 31st day of March, 1914, we advanced and furnished the defendant Southern Oregon Company * * * $35,000.00 * * *. This

was our money. It never ceased to be our money. We permitted its use by the Southern Oregon Company for a purpose that failed and we recalled the money. That is all there is to it.

It is true that in Paragraph XIII we have alleged that the "defendant Southern Oregon Company duly assigned to this plaintiff whatever interest it might be said to have had in said sums of money or any of them, and duly authorized this plaintiff to apply to the defendant Flanagan & Bennett Bank, or any person having possession of said moneys, or any of them, and to demand the return of the same and repayment thereof to this plaintiff." But this was not necessary. The complaint would have been perfectly good without it. The Southern Oregon Company was made a party-defendant in order that all parties might be brought into Court in the same proceeding and the full history of the transaction might appear on the face of the complaint. No claim is made here by the Southern Oregon Company and none can be made.

As conclusively appears from the authorities cited in our first brief, it is entirely immaterial in this case how the defendant got possession of this money or from whom or when. Confessedly it has possession of it and it belongs to this plaintiff and plaintiff has never parted with the title to it to anybody, and therefore assumpsit will lie.

In Critzer v. McConnell, 15 Ill. 172, the syllabus is:

> "Trust Funds — Misapplication — Form of Action.—If A. pays money to B. to be applied to a particular purpose, and B. delivers the same money to C. to be applied to the same purpose; if C. misapplies the money, A. may recover the money back from C. in an action for money had and received."

Applying that here it would read, that if plaintiff advanced money to the Southern Oregon Company for a particular purpose and the Southern Oregon Company gave the same money to Flanagan & Bennett Bank for the same purpose; if the Bank did not comply with that purpose, an action for money had and received may be brought.

In 47 L. R. A. 369, Hindmarch v. Hoffman, the money was stolen and the true owner followed it into the bank where the thief had deposited it, and an action for money had and received was sustained.

In Van Allen v. American Nat. Bank, 52 N. Y. 1-6-7, and Garland v. Salem Bank, 6 Am. Dec. 86, the same doctrine is announced, *i.e.,* the principal does not lose title to the money and may bring an action for money had and received without reference to what the agent or the party entrusted with the money, by whatever name he is known, may have done.

In this case plaintiff does not base its right upon any assignment or authorization made by the Southern Oregon Company. If the Southern Oregon Company should deny the allegation that it had assigned

"whatever interest it might be said to have had in said sum of money," and should prove that as a matter of fact it had made no such assignment, it would not alter plaintiff's rights in the least or prevent plaintiff from requiring the return of this money by the Bank and suing for it in assumpsit if possession was refused.

Respectfully submitted,

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